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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

COLUMBIA BROADCASTING SYSTEM, INC.,
A CORPORATION,
Petitioner,

VS.

THE HONORABLE OMER POOS, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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OPINIONS BELOW.

The Seventh Circuit denied the petition of Columbia Broadcasting System, Inc. for a writ of mandamus without opinion; a copy of the order of denial is reproduced in Appendix "A", *infra.* The order of the District Court denying the motion of Columbia Broadcasting System, Inc. to transfer the cause to the Northern District of Illinois, Eastern Division, is unreported but is reproduced in Appendix "B", *infra.*

JURISDICTION.

The order of the Seventh Circuit was entered on October 21, 1969. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254.

QUESTIONS PRESENTED.

(1) Whether protection and encouragement of First Amendment rights of free speech and press compel the granting of a transfer motion under 28 U. S. C. § 1404(a) *in a libel suit brought by one who is a public official or a* public figure under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), when the district chosen by the plaintiff has no relationship or connection with the lawsuit and is manifestly an inconvenient forum for the trial.

(2) When all the prescribed standards in favor of transferring a case under § 1404(a) are clearly met, and the forum selected by the plaintiff has no relationship or connection with the lawsuit, may the District Court properly refuse to transfer on the ground that the plaintiff's choice of forum is of controlling weight?

STATUTE INVOLVED.

The statute governing transfer of causes from one district to another is 28 U. S. C. § 1404(a); it provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

(a) General Walker's Suit for Defamation.

The plaintiff below is Edwin A. Walker, a retired Major General and a resident of Texas. In the fall of 1962, General Walker traveled from Texas to the University of Mississippi to attend the racial disturbances and conflicts there raging over the matriculation of the school's first

Negro student; the General's presence, actions and statements during the stormy events on the Mississippi campus were the subject of national publicity and controversy.

General Walker later filed 18 suits for defamation against news publishers and other media for reporting his acts and utterances at the Mississippi race riots; most of the suits were filed in Southern or border states or rural areas.[1] In the first suit to reach trial, General Walker was awarded a verdict of $500,000 in the District Court of Tarrant County, Texas; the judgment was later reversed by this Court in *Associated Press* v. *Walker*, 388 U. S. 130 (No. 150, Oct. Term 1966)[2] on the grounds that General Walker was a public figure and had failed to meet his burden of proving actual malice under *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

General Walker's suit in the instant case is against the petitioner, Columbia Broadcasting System, Inc. (CBS); Walker claims he was defamed in a radio broadcast that occurred in Chicago, Illinois over Station WBBM, owned by petitioner CBS. The broadcast was an evening "telephone talk" show on September 16, 1967, in which a WBBM announcer, Donald Cannon, discussed with an unidentified caller General Walker's activities at the Mississippi riots; Cannon allegedly said that General Walker stated, "Let's go kill them, men," and that General Walker spent time in a mental hospital.

General Walker filed the suit in the U. S. District Court for the Southern District of Illinois, Southern Division, sitting in Springfield. Springfield, Illinois is some two hundred miles south of Chicago.

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1. Appendix C, *infra*, contains a complete list of General Walker's 18 libel suits and the jurisdictions in which they were filed.

2. Decided together with *Curtis Publishing Co.* v. *Butts* (No. 37, Oct. Term, 1966).

(b) The Motion to Transfer.

The petitioner CBS filed a timely motion to transfer General Walker's suit to Chicago, *i.e.*, the Northern District of Illinois, Eastern Division, pursuant to 28 U. S. C. § 1404(a). The motion and supporting affidavits established without dispute that *none* of the parties and *none* of the witnesses resided in the Southern District of Illinois, and *none* of the events relevant to the suit occurred there. Thus, the record demonstrated:

(a) The defendant's radio station that broadcast the alleged defamation, WBBM, is located in Chicago;

(b) Station WBBM's primary signal, listening audience and market are outside the Southern District of Illinois and are in fact in the metropolitan area of Chicago and Cook County;

(c) All of Station WBBM's employees resided in Chicago (or Cook County);

(d) The announcer of the program that Walker attacks resided in Chicago;

(e) No known witnesses resided in the Southern District of Illinois;

(f) The plaintiff General Walker resides in Texas and not the Southern District of Illinois;

(g) Defendant CBS is incorporated in New York and has no relevant place of business or property within the State of Illinois except in Chicago.

The announcer of the program in question, Donald Cannon, was named a defendant to the suit along with CBS, but he was never served. In support of its motion to transfer the cause to Chicago, CBS filed an affidavit by Cannon establishing that the travel and time necessary for him to testify in Springfield, rather than Chicago, would

result in severe personal hardship to his wife and children and would handicap him in his job.

General Walker filed no counter-affidavits in opposition to the motion to transfer; he instead filed a Memorandum stating that if CBS would admit the allegations of the complaint, there would be no contested issues of fact and thus no need for a trial in any forum. With regard to announcer Cannon's affidavit of hardship, General Walker's Memoradum stated:

> "The defendant Cannon's affidavit states no ground proper for consideration on a motion to transfer. His 3:00 p.m. broadcasts can be recorded in advance for the day of trial, and he can fly back on any given day in time to make his 9:00 p.m. broadcasts. . . ."[3]

The motion for transfer was denied by Judge Omer Poos of the Southern District of Illinois, Southern Division on June 11, 1969. The brief order of denial (see Appendix B, *infra*) states:

> "It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, *a party plaintiff is entitled to his choice of forum if at all feasible* and if the forum is one provided for by law." (Emphasis added.)

(c) The Order of the Seventh Circuit.

CBS filed a petition for writ of mandamus in the Seventh Circuit to review and set aside the District Court's denial of the motion to transfer under § 1404(a).[4] The petition,

3. After CBS filed its mandamus petition in the Seventh Circuit, General Walker voluntarily dismissed Cannon as a party defendant. However, Cannon is still, of course, a prospective witness of great importance to CBS.

4. It is clear that mandamus is the correct procedure to review the denial of a § 1404(a) transfer motion. *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), and authorities cited therein.

supported by affidavits and exhibits, contended that all standards governing transfer of cases prescribed in § 1404(a) were clearly met; the petition also urged that forcing the defendant to stand trial in a district chosen by Walker and unrelated to the suit would seriously impair and infringe First Amendment rights of free speech and press.

The Seventh Circuit granted leave to file the petition for mandamus and ordered General Walker to file an answer. Then, without receiving briefs and without hearing argument, the Seventh Circuit denied the petition for mandamus. The order denying the petition states:

> "On consideration of petitioner's request for mandamus and respondent's reply thereto, we find that petitioner has not shown that respondent has clearly abused his discretionary power pursuant to § 1404(a) and, consequently, mandamus is not appropriate. See *Butterick Co.* v. *Hubert L. Will,* 316 F. 2d 111, 113 (7th Cir. 1963)." (Appendix "A", *infra.*)

CBS now seeks certiorari to review the Seventh Circuit's decision.

REASONS FOR GRANTING THE WRIT.

We submit this case clearly presents an important question of federal law that has not been, but should be, settled by this Court. The prescribed standards for transfer of cases under § 1404(a) have never been considered by this Court in the unique First Amendment context of a libel action in which the plaintiff is a public official or a public figure within the meaning of *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964), and its progeny. The courts below held that in such a case the *plaintiff's choice of forum alone* is the paramount and controlling factor for deciding a transfer motion under § 1404(a); there is no good reason to believe that the lower courts gave any serious weight to other factors, and particularly to the gravely inhibiting effect that denial of transfer will have upon the exercise of First Amendment rights.

We think that in such cases the plaintiff's choice of forum cannot constitutionally be the factor to control decision of a transfer motion. Otherwise, libel plaintiffs such as General Walker will naturally choose districts where the defendant will be financially burdened, inconvenienced and disadvantaged in defending the suit, and where the local climate is favorable to the plaintiff's viewpoints and personality. The result will be to chill and suppress the free exercise of valued First Amendment rights of speech and press by forcing publishers to trial in distant, alien or hostile forums.

The instant case is especially appropriate for in-depth consideration of § 1404(a) transfer standards in the context of the First Amendment. This Court has already held that the plaintiff, General Walker, is a public figure within the *New York Times* doctrine, by virtue of

his voluntary attendance and conduct at the University of Mississippi racial disturbances. *Associated Press* v. *Walker*, 388 U. S. 130, 155 (1967). The allegedly defamatory words in this case concern the same activities and conduct of General Walker that were involved in *Associated Press* v. *Walker*. Moreover, the record is crystal clear that General Walker has selected a district that has no connection or relationship with his suit against CBS; no parties or witnesses reside in the Springfield district and no events related to the suit occurred there. The record is equally clear that the Chicago district to which transfer is sought has as close—if indeed not the closest—connection with the suit as any district in the country; trial in Chicago would manifestly be more convenient and economical to the parties and the witnesses than trial in Springfield.

We turn first to the importance of reviewing the decision below from the standpoint of fostering basic First Amendment rights of free speech and press.

I. THE PRINCIPLES AND OBJECTIVES OF THE FIRST AMENDMENT COMPELLINGLY FAVOR GRANTING A MOTION TO TRANSFER UNDER § 1404(a) IN A DEFAMATION SUIT SUCH AS WALKER'S.

This Court's decisions have repeatedly stressed the critical importance of protecting and encouraging free exercise of the preferred rights of speech and press under the First Amendment; the Court has aptly described these rights as ones that "we value most highly" and that "are essential to the workings of a free society." *Speiser* v. *Randall*, 357 U. S. 513, 321 (1958). See also, *e.g.*, *DeJonge* v. *Oregon*, 299 U. S. 353, 364 (1937); *Stromberg* v. *California*, 283 U. S. 359, 369 (1932). The necessity of safeguarding and stimulating free public discussion and debate has received

strongest emphasis in the line of "public official" and "public figure" libel cases led by *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964). *E.g., Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Henry* v. *Collins,* 380 U. S. 356 (1965); *St. Amant* v. *Thompson,* 390 U. S. 727 (1968).

In *New York Times,* the Court clearly recognized that the inordinate expense of defending libel actions and the fear of enormous jury verdicts are a significant deterrent to free and uninhibited public discussion; the cardinal and expressed purpose of the *New York Times* doctrine is to reduce "self-censorship" by publishers to a minimum:

> "[W]ould be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court *or fear of the expense of having to do so.* They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U. S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279 (1964). (Emphasis added.)

So also, the Court declared in *Time, Inc.* v. *Hill,* 385 U. S. 374, 389 (1967):

> "Fear of large verdicts in damage suits for innocent or mere negligent misstatement, *even fear of the expense involved in their defense,* must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' *New York Times Co.* v. *Sullivan,* 376 U. S. 279; see also *Speiser* v. *Randall,* 357 U. S. 513, 526; *Smith* v. *California,* 361 U. S. 147, 153-154; and thus 'create the danger that the legitimate utterance will be penalized.' *Speiser* v. *Radall, supra,* at 526." (Emphasis added.)

And see *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965):

> "The chilling effect upon the exercise of First Amendment rights may derive from the fact of the

prosecution, unaffected by the prospects of its success or failure."

The suppressiveness and the chilling effect of libel suits upon First Amendment rights are severe enough when the suits are brought in the defendant's home forum; the courts have recognized that defense of libel actions often entails unusual and excessive expense. *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922; *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 (1967). Clearly, the chilling effect of such actions will be inevitably increased and intensified if plaintiffs, such as General Walker here, may require defendants to transport witnesses and evidence and stand trial in distant, inconvenient and strange forums having no connection or relationship with the lawsuit, and picked solely at the whim of the plaintiff. If those who would speak and write about the people and affairs of the day are faced with such an expensive and dangerous exposure, they will manifestly be more reluctant and unwilling to speak or publish.

General Walker did not originate the tactic of suing for libel in a jurisdiction inconvenient, unfamiliar or hostile to the defendant; the tactic has long been a peculiar favorite of those who would silence or suppress all criticism of their conduct and viewpoints concerning controversial public issues.[5] The propensity of libel plaintiffs to sue

5. The practice dates back at least to the Star Chamber, which heard all cases of seditious libel or "libel on government," *i.e.,* any published criticism of the Crown or the affairs of royalty. The Star Chamber tried its victims in London regardless of the situs of their "crimes"; even foreigners whose alleged crimes occurred outside England were forced to travel to London for "trial" and inevitable punishment (consisting of unbelievable physical torture and fines). See Burn, *The Star Chamber,* pp. 14-15 (London, 1870); Bruce, *An Outline of the History of the Court of Star Chamber,* p. 351 (1833). Later the practice was utilized during the colonial period in this country, both by the

(Cont'd next page.)

publishers away from their home base has increased significantly since the inception of *New York Times Co.* v. *Sullivan.* Indeed, the plaintiff Sullivan in that case, together with the eleven other southern officials who sued the *New York Times* for publishing views critical of segregation in the South, brought their suits in Alabama, the forum most likely to convict the *Times.* See *Parks, et al.* v. *New York Times Co.,* 195 F. Supp. 919 (M. D. Ala. 1962); *New York Times Co.* v. *Connor,* 365 F. 2d 567 (5th Cir. 1966). Public officials and public figures have subsequently followed the same practice with increasing frequency;[6] General Walker himself has in fact been the standard-bearer of the movement.

In Appendix C, *infra,* we have listed all of the eighteen libel suits that General Walker has filed since 1963. In six of these cases, General Walker sued the Associated Press in southern states (Arkansas, Louisiana, Mississippi, Florida, Missouri and Texas); most of the remaining actions were brought in southern or border states or rural areas. Clearly, General Walker more than any other libel plaintiff has exhibited a pattern of suing his critic-adversaries in jurisdictions that are either inconvenient or unfavorable to the defendant, or both.

Several courts have recognized the tactic of suing publishers in distant forums as a grave threat to First Amend-

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Crown and some of the colonial governments, to stifle political dissent and public unrest. See Levy, *Legacy of Suppression,* pp. 32-34 (Harvard Univ. Press, 1960). Even after the Constitution was ratified, there have been repeated attempts by would-be suppressers and censors to try their critics in distant and alien forums. See, *e.g., In re Dana,* 6 Fed. Cas. No. 3554 (1873); *United States* v. *Smith,* 173 Fed. 227 (D. C. Ind. 1909). And see especially the Brief of the Tribune Company as Amicus Curiae in *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1954), pages 2-10.

6. See, *e.g., Curtis Publishing Co.* v. *Birdsong,* 360 F. 2d 344 (5th Cir., 1966); *Buckley* v. *New York Times Co.,* 338 F. 2d 470 (5th Cir., 1964).

ment freedoms of speech and press, and have refused to permit service of process under state "long arm" statutes, upon the ground that the defendant publishers did not have sufficient contacts with the forum under the doctrine of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945). *E.g., New York Times Co.* v. *Connor,* 365 F. 2d 567 (5th Cir. 1966); *Buckley* v. *New York Times Co.,* 338 F. 2d 470 (5th Cir. 1964). In fact, three of General Walker's libel suits have been dismissed upon the ground that the defendant publishers had insufficient contacts to permit "long arm" service. *Walker* v. *Field Enterprises, Inc.,* 332 F. 2d 632 (10th Cir. 1964); *Walker* v. *General Features Corp.,* 319 F. 2d 583 (10th Cir. 1963); *Walker* v. *Savell,* 335 F. 2d 536 (5th Cir. 1964).[7] Signally, in *Walker* v. *Savell, supra,* the Fifth Circuit thus perceived and expressed the constitutional basis for distinguishing between foreign publishers and defendants in other kinds of tort suits:

> "Moreover, . . . we think there is peculiar significance in the application of this rule to foreign corporations or parties that may be clothed with some of the constitutional protections dealing with freedom of the press. . . . We think there is reason for such a distinction because of the inherent danger or threat to the free exercise of the right of freedom of the press if jurisdiction in every state can be inferred from minimal contacts." (335 F. 2d at 543-44.)

The same reasoning applies with equal force to motions for transfer of libel suits under § 1404(a). If the decision below refusing transfer is allowed to stand, it will be an open invitation for libel plaintiffs such as General Walker to hand-pick districts that will be inconvenient and unfavor-

7. In the *Field Enterprises* case, General Walker attempted to sue the publisher of the *Chicago Daily News* in Oklahoma; the *News* had a daily circulation of 26 newspapers in Oklahoma. In the *General Features case,* Walker brought suit in Oklahoma against a New York news feature syndicate that had sold the allegedly libelous article to the *Chicago Daily News.*

able for the defendants; we respectfully urge that certiorari be granted to consider the decision's grave impact and chilling effect on First Amendment rights.

II. THE DECISION BELOW MANIFESTLY DISREGARDS AND THWARTS THE GOVERNING STANDARDS FOR TRANSFER PRESCRIBED IN § 1404(a).

In addition to the First Amendment issue, this case presents an important question concerning the construction and application of the transfer statute that has not been, but should be, resolved by this Court.[8] Section 1404(a) specifically prescribes three, and only three, criteria or standards to be applied in deciding a motion for transfer: (1) the convenience of parties, (2) the convenience of witnesses, and (3) the interest of justice. In the instant case, the District Court patently did not consider the specific criteria prescribed in the statute, save in the most cursory lip-service fashion. Indeed, it is manifest that the District Court, instead of evaluating and applying the three criteria of § 1404(a), considered and gave controlling weight to a factor not prescribed in the statute, *i.e.*, the plaintiff's selection of forum. Thus, the District Judge in denying transfer stated:

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8. The importance and the salutary purposes of the transfer statute have been aptly described by this Court in *Van Dusen* v. *Barrack*, 376 U. S. 612, 616 (1964) as follows:

> "Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice. Thus, as the Court recognized in *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, 26, 27, the purpose of the section is to prevent the waste 'of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense. . . .' To this end it empowers a district court to transfer 'any civil action' to another district court if the transfer is warranted by the convenience of parties and witnesses and promotes the interest of justice."

See also *Hoffman* v. *Blaski*, 363 U. S. 335 (1960).

> "It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, *a party plaintiff is entitled to his choice of forum if at all feasible* and if the forum is one provided for by law." (Emphasis added.)

Although some prior cases under § 1404(a) have stated that the plaintiff's choice of forum is entitled to consideration, none has held it to be supreme over all other factors. On the contrary, the far stronger weight of authority holds that the plaintiff's choice of forum is the *least* important factor *when that forum has no connection or relationship with the lawsuit and none of the parties or witnesses reside there,* as in the case at bar. Thus, the court in *Morgan* v. *Illinois Central Ry. Co.,* 161 F. Supp. 119, 120 (S. D. Tex. 1958) held:

> "Where, however, as here, none of the operative facts occurred within the forum of original selection, the plaintiff's choice is entitled to only minimal consideration."

And, in *Cressman* v. *United Air Lines,* 158 F. Supp. 404, 407 (S. D. N. Y. 1958), the court held:

> "Though plaintiff's choice of forum is a significant factor to be considered, where the plaintiff brings suit in a jurisdiction which is neither his home forum, nor has any connection whatever with the matter in controversy, that choice is to be accorded less weight than would ordinarily be the case."

Other cases so holding are legion. *E.g., Early & Daniel* v. *Wedgefield, Inc.,* 164 F. Supp. 414 (M. D. N. C. 1958); *Josephson* v. *McGuire,* 121 F. Supp. 83 (D. Mass. 1954); *McHoney* v. *Marine Transport Lines, Inc.,* 117 F. Supp. 312 (S. D. N. Y. 1953); *Rodgers* v. *Northwest Airlines, Inc.,* 202 F. Supp. 309 (S. D. N. Y. 1962); *United States* v. *General Motors Corp.,* 183 F. Supp. 858 (S. D. N. Y. 1960). The

decision below is clearly in conflict with the above-cited authorities and it stultifies both the letter and the spirit of § 1404(a). (See *Van Dusen* v. *Barrack, supra,* p. 13, n. 8). Indeed, if the plaintiff's selection of forum is to be given controlling weight over the criteria set forth in § 1404(a) we submit the statute in plain effect has been repealed.

Although the Seventh Circuit in denying the writ of mandamus stated that no abuse of the District Court's "discretionary power" had been shown (Appendix A, *infra*), we submit that the refusal to transfer this case cannot be so supported or rationalized. By granting leave to file the petition for mandamus, requiring an answer and then denying the writ, the Seventh Circuit clearly approved and endorsed the District Court's holding that plaintiff's choice of forum is of controlling force. If the District Court had properly evaluated and applied the governing criteria of § 1404(a), instead of holding plaintiff's selection of forum to be paramount, we submit the cause would have been transferred. Thus, the record shows with respect to each of the three criteria specified in § 1404(a):

1. *Convenience of the Parties.* Beyond any question, no party would find trial in Springfield, Illinois more convenient than Chicago. The petitioner CBS will certainly find trial in Chicago most convenient because its radio station, WBBM, its employees, and its sole offices in Illinois are located in Chicago. Nor can the plaintiff, General Walker, who resides in Texas, seriously claim that Springfield would be more convenient than Chicago for trial; it is manifestly as easy (or easier) to obtain airline or other travel connections between Texas and Chicago rather than Texas and Springfield.

2. *Convenience of the Witnesses.* It is clear that the vast majority of witnesses—if not all of them—who heard

the allegedly defamatory broadcast live either in Chicago or much closer to Chicago than Springfield, Illinois. Since Station WBBM's primary signal, listening audience and market area are in the metropolitan area of Chicago rather than Springfield, it is entirely possible that no resident of the Springfield, Illinois area heard the broadcast in question (see Statement of the Case, p. 4, *supra;* see also, Exhibit "G" to the Petition for Mandamus in the Court of Appeals). Moreover, since a pivotal issue at the trial will be that of actual malice, *i.e.*, knowledge of falsity or the harboring of serious doubts as to truth or falsity (*New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968)), testimony will be required concerning the basis upon which the announcer made the allegedly defamatory statement and the efforts defendant took to prevent broadcasting of defamatory statements. The witnesses who would testify for the petitioner CBS on the malice issue are in Chicago or Cook County. General Walker has made no indication of what witnesses he would propose to call (besides himself); it is quite clear, however, that if he calls witnesses from the scene of the Mississippi riots or his home state of Texas, it would just as easy, if not easier, for such witnesses to travel to Chicago rather than Springfield, Illinois.

3. *The Interest of Justice.* In determining the "interest of justice" standard of § 1404(a), the courts have held[9] that several factors should be evaluated, all of which clearly preponderate in favor of litigating General Walker's suit in Chicago rather than Springfield, Illinois. Thus:

(a) *Availability of Compulsory Process to Compel the Attendance of Unwilling Witnesses.* If the suit is

9. *E.g., A. C. Samford, Inc.* v. *United States*, 226 F. Supp. 72, 78-79 (M. D. Ga. 1963); *United States* v. *General Motors Corp.*, 183 F. Supp. 858, 860-62 (S. D. N. Y. 1960); *Rhodes* v. *Barnett*, 117 F. Supp. 312, 315 (S. D. N. Y. 1953).

tried in the Southern District of Illinois, no party could compel an unwilling witness living in Chicago or elsewhere outside the Southern District to testify (*Federal Rules of Civil Procedure,* Rule 45(e) (1)). No known witnesses reside in the Southern District.

(b) *The Smaller Amount of Expenses Required for Willing Witnesses.* Petitioner CBS would incur costs in excess of $500 per day for each employee-witness required to travel to Springfield for trial (see Exhibit "D" to the Petition for Mandamus in the Court of Appeals). As to other witnesses from the Chicago area, it would manifestly be much more expensive for them to appear and testify in Springfield rather than Chicago.

(c) *Whether Any Controverted Issue of Fact Depends upon Any Event Occurring in the District Selected by Plaintiff.* No operative fact or controverted issue depends upon *any* event occurring in the Southern District of Illinois, Southern Division. (See Statement of the Case, *supra,* at page 4). See *Morgan* v. *Illinois Central Ry. Co.,* 161 F. Supp. 119 (S. D. Texas 1958).

(d) *Ease of Access to Sources of Proof.* There are clearly no sources of proof in the Southern District of Illinois. Many if not all known sources of relevant proof are in fact in the Chicago area since the petitioner's radio station, WBBM, is located there, and its employees and pertinent files and records are there also. (See Statement of the Case, *supra,* at page 4).

In light of all the above factors we submit that the failure to order transfer was rank error and in fact flouts the entire purpose and intent of § 1404(a).

Finally, a factor that was referred to by the District Judge in his order refusing transfer requires mention and

refutation, *i.e.*, "court trial docket calendars" (Appendix "B", *infra*). The refusal to transfer clearly cannot be supported on the ground that the docket is more congested, or the time for disposing of cases is longer, in the Northern District of Illinois than in the Southern District. The Northern District of Illinois has eleven district judges and the Southern District has two. (28 U. S. C. § 133.) The official *Report of the Business of the Federal Courts of the Seventh Judicial Circuit* for the year ending December 31, 1968 (prepared and issued by the Clerk of the Seventh Circuit) plainly demonstrates that cases are tried and disposed of as expeditiously in the Northern District as they are in the Southern District of Illinois.[10]

In sum, we think that the District Court not only abused its discretion but committed palpable error in refusing to transfer the case when all of the express criteria set forth in § 1404(a) favored transfer. Even if the case did not involve special First Amendment considerations, we submit this Court should grant review to consider the unjustifiable and erroneous failure below to apply the standards of § 1404(a). In any event, however, since the standards of § 1404(a) are closely intertwined with First Amendment rights in this case (Point I, *supra*), we submit certiorari should *a fortiori* be granted.

---

10. Thus, the Report states that the Northern District of Illinois during 1968 enjoyed a decrease of 7.2 per cent of cases filed in 1968 from the previous year. The Report also states that "Again, the largest number of cases terminated [in the Seventh Circuit] was in the Northern District of Illinois, with 12,976 cases terminated, a decrease of 865 cases, being 6.2 per cent under the previous year."

The same Report discloses that in 1967 in the Northern District, 13,594 cases were filed and 13,841 cases were closed; in 1968 in the Northern District, 12,600 cases were filed and 12,976 cases were closed. In the Southern District of Illinois in 1967, 3,071 cases were filed and 2,800 cases were closed; in 1968 in the Southern District 2,987 cases were filed and 2,934 cases were closed.

CONCLUSION.

For the foregoing reasons, we submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 16, 1970.

APPENDIX "A".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604.

October 21, 1969.

Before
Hon. Latham Castle, Chief Judge.
Hon. Roger J. Kiley, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation,
Petitioner,
vs.
No. 17976
THE HONORABLE JUDGE OMER POOS, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS,
Respondent.

Original Petition for Writ of Mandamus.

ORDER.

Petitioner has filed an application for a writ of mandamus to compel the Honorable Omer Poos to transfer the matter of *Walker* v. *The Columbia Broadcasting System, Inc.*, from the Southern District of Illinois, Southern Di-

vision, to the Northern District of Illinois, Eastern Division, pursuant to 28 U. S. C. § 1404(a);

On consideration of petitioner's request for mandamus and respondent's reply thereto, we find that petitioner has not shown that respondent has clearly abused his discretionary power pursuant to § 1404(a) and, consequently, mandamus is not appropriate. See *Butterick Co.* v. *Hubert L. Will*, 316 F. 2d 111, 113 (7th Cir. 1963).

WHEREFORE, IT IS ORDERED that the Petition for Mandamus be and it is hereby denied.

APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT
Southern District of Illinois
Southern Division.

EDWIN A. WALKER,
Plaintiff,
vs.
COLUMBIA BROADCASTING SYSTEM, INC. and DONALD J. CANNON,
Defendants.

Civil No. 4281.

ORDER.

This cause comes on for determination upon the motion of defendant Columbia Broadcasting System, Inc. for change of venue, pursuant to Section 1404(a) of Title 28, United States Code, which section reads:

> "For the convenience of parties and witnesses, in the interest of justice, a district court *may* transfer any civil action to any other district or division where it might have been brought." (Emphasis supplied.)

It is the opinion of this Court that, all things being considered, including court trial docket calendars, number and locality of witnesses, among other matters, a party plaintiff is entitled to his choice of forum if at all feasible and if the forum is one provided for by law.

Accordingly, upon due consideration of all points raised

in this matter by both parties, the Court finds, in a sound exercise of its discretion, that the motion for change of venue in the instant circumstances is not well taken and should be denied.

It is so ordered.

Entered this 11th day of June, 1969, at Springfileld, Illinois.

/s/ Omer Poos,
United States District Judge,
Chief Judge.

APPENDIX "C".

LIBEL SUITS FILED BY MAJOR GENERAL EDWIN A. WALKER.

1. *Walker* v. *Associated Press,* in District Court, Tarrant County, Texas, 393 S. W. 2d 671 (Tex. Civ. App. 1965). Reversed and remanded sub nom. *Curtis Publishing Co.* v. *Butts,* 388 U. S. 130 (1967).
2. *Walker* v. *Associated Press,* in Circuit Court, Duval County, Florida, removed to the United States District Court for the Middle District of Florida (No. 64-267-Civil-J).
3. *Walker* v. *Associated Press,* in Circuit Court, Pulaski County, Arkansas, removed to the United States District Court for the Eastern District of Arkansas (No. LR-65-C-178).
4. *Walker* v. *Associated Press and Times-Picayune Publishing Corp.,* in District Court, Caddo Parish, Louisiana, 191 So. 2d 727 (La. App. 1966).
5. *Walker* v. *Denver Post, Inc. and Associated Press,* in District Court, Denver County, Colorado, Colo., 417 P. 2d 486 (1966).
6. *Walker* v. *Kansas City Star Co. and Associated Press,* in Circuit Court, Jackson County, Missouri, 406 S. W. 2d 44 (Mo. Sup. 1966).
7. *Walker* v. *Savell and Associated Press,* in Circuit Court, Lafayette County, Mississippi, removed to United States District Court for the Northern District of Mississippi, 335 F. 2d 536 (5th Cir. 1964).
8. *Walker* v. *Courier-Journal and Louisville Times Co. and WHAS, Inc.,* in United States District Court for the Western District of Kentucky, 246 F. Supp. 231 (W. D. Ky. 1965).

9. *Walker* v. *Times Publishing Co.*, Circuit Court, Pinellas County, Florida, No. 17694-L.
10. *Walker* v. *Atlanta Newspapers, Inc. and McGill*, in United States District Court for the Northern District of Georgia (Civ. No. 8590).
11. *Walker* v. *Journal Co.*, in United States District Court for the Eastern District of Wisconsin (Civ. No. 64-C-270).
12. *Walker* v. *Journal Co.*, in United States District Court for the Eastern District of Wisconsin (Civ. No. 64-C-276).
13. *Walker* v. *Gazette Publishing Co.*, in Circuit Court, Pulaski County, Arkansas (Civ. No. 58857).
14. *Walker* v. *Arkansas Democrat Co.*, in Circuit Court, Pulaski County, Arkansas (Civ. No. 58858).
15. *Walker* v. *Pulitzer Publishing Co.*, in United States District Court for the Eastern District of Missouri, 394 F. 2d 800 (8th Cir. 1968).
16. *Walker* v. *Field Enterprises, Inc.*, in United States District Court for the Western District of Oklahoma, 332 F. 2d 632 (10th Cir. 1964).
17. *Walker* v. *General Features Corp.*, in United States District Court for the Western District of Oklahoma, 319 F. 2d 583 (10th Cir. 1963).
18. *Walker* v. *Columbia Broadcasting System, Inc.*, in United States District Court for the Southern District of Illinois, Southern Division (Civil No. 4281).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

1085

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation,
Petitioner,

vs.

THE HONORABLE OMER POOS, Chief Judge of the U. S. District Court for the Southern District of Illinois, Southern Division,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

COLUMBIA BROADCASTING SYSTEM, INC., a Corporation,
Petitioner,

vs.

THE HONORABLE OMER POOS, Chief Judge of the U. S. District Court for the Southern District of Illinois, Southern Division,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Seventh Circuit denied the petition of Columbia Broadcasting System, Inc. for a writ of mandamus to compel a change of venue for the reason: "we find that petitioner has not shown that respondent has clearly abused his discretionary power pursuant to § 1404(a) and, consequently, mandamus is not appropriate. See **Butterick Co. v. Hubert L. Will**, 316 F. 2d 111, 113 (7th Cir. 1963)."

On June 11, 1969, the Respondent Court found "in a sound exercise of its discretion, that the motion for change of venue in the instant circumstances is not well taken and should be denied." On September 22, 1968,

the Respondent Court denied the CBS Motion for Reconsideration, saying "such Motion is denied for the reason set forth in the original order of June 11, 1969."

STATUTE AND RULES INVOLVED

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U. S. C., § 1404(a)

Considerations governing issuance of extraordinary writs.

"The issuance by the court of any writ authorized by 28 U. S. C. A., § 1651(a), is not a matter of right but of sound discretion sparingly exercised."

Supreme Court Rule 30

Procedure on applications for extraordinary writs.

1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U. S. C. A., § 1651(a), or 28 U. S. C. A., § 2241, shall be prefaced by a motion for leave to file such petition and both shall be printed."

Supreme Court Rule 31

QUESTIONS PRESENTED

1. Whether the extraordinary writ of mandamus may be used to control the decision of the trial court on a matter within the sphere of its discretionary power.

2. Whether the extraordinary writ of mandamus may be invoked in an ordinary question of venue involving the exercise of conceded judicial power.

3. Whether the extraordinary writ of mandamus may be used to review a nonappealable interlocutory order.

4. Whether under a discretionary statute saying that "in the interest of justice a district court may transfer," and a transfer will merely shift the inconvenience from one party to the other and will delay the trial for about a year (this petition for certiorari prevented a trial on January 29, 1970), it is in the interest of justice to decide that the district court must transfer the case.

5. Whether the petition for an extraordinary writ violates paragraphs 1 and 2 of Supreme Court Rule 31 because it is not "prefaced by a motion for leave to file such petition."

STATEMENT OF THE CASE

(a) The Parties

The plaintiff was unsuccessful in obtaining service upon the individual defendant, Donald J. Cannon; and, since he is no longer employed by defendant COLUMBIA BROADCASTING SYSTEM, INC. (hereinafter referred to as CBS) and is not a necessary party, plaintiff voluntarily dismissed him from these proceedings on October 11, 1969, in accordance with Rule 41(a)(1). Although the parties to this case are CBS and Judge Omer Poos, and the case involves a purely procedural point, CBS devotes much of its argument to criticizing the plaintiff Walker. Counsel for CBS allege that General Walker filed 18 suits for defamation, mostly in Southern or rural areas. That is not relevant and possibly was inserted for prejudicial purposes. The suits were filed in Fort Worth; Jacksonville and Clearwater, Florida; Little Rock; New Orleans; Denver; Kansas City; Oxford, Mississippi; Louisville; Atlanta; Milwaukee; St. Louis, Oklahoma City; and Springfield, Illinois. None of these is rural and they are about equally balanced between southern, and northern and western jurisdictions.

(b) **The Place of Suit**

CBS alleges that no party or act involved in this case has any relationship to the Southern District where suit was filed, that "all of defendant's employees reside in Chicago," and that "Station WBBM's primary signal, listening audience and market are outside of the Southern District and are in fact in Cook County."

The party involved in this case, namely CBS, operates a network of many television stations and radio stations, some of which are in cities in the Southern Judicial District of Illinois, such as Springfield, Decatur, Rock Island, Quincy and Peoria.

According to CBS Exhibit A to its Brief in Support of Defendant's Motion for Change of Venue, the Nielsen "Market Coverage Area" for CBS Station WBBM shows that this Station covers the following counties in the Southern Judicial District, namely Bureau, De Witt, Fulton, Henderson, Knox, Livingston, Logan, Marshall, McDonough, McLean, Putnam, Warren and Woodford. This CBS Exhibit also shows that the WBBM broadcasts are heard in the remaining counties in the Southern District.

It is noteworthy that said CBS Nielsen Market Coverage Area or Service Chart, has been cropped and is dated "Fall '60." A complete recent Nielsen Coverage Service Chart may show that CBS Station WBBM covers even more counties in the Southern Judicial District than the 13 counties admitted in said CBS Exhibit A.

In paragraph H of the CBS letter to the Clerk of the U. S. Court of Appeals dated October 16, 1968, CBS admitted that it owns a 42-acre tract of real estate in Madison County, Illinois, which is in the Southern Judicial District of Illinois, and which is the site of the transmitters for the CBS owned KMOX-TV and KMOX AF-FM radio broadcasts. Since CBS actually owns only five

radio and television stations (WBBM, KMOX, WCBS, WGAU and KNXT), it would appear that about 20% of its station-owned broadcast programs originate in said Southern Judicial District from KMOX, and about another 20% of its station-owned broadcast radio programs (from WBBM) are received in said Southern Judicial District.

(c) **The Motion to Transfer**

CBS's Motion to Transfer was filed on October 22, 1968, the last day for pleading to the summons, and without any supporting affidavit. Fifty-five days later and without leave of court, CBS filed said Brief and one affidavit. The CBS Motion to Transfer was not verified.

In paragraph 1, CBS alleged that "its only place of business in Illinois is located at 630 North McClurg Court, in the City of Chicago," and that it is not "doing business" in the Southern District of Illinois.

In its letter to the Clerk of the Court of Appeals dated October 16, 1969, CBS admitted that it had not one but six places of business in Cook County and that it also owned and used a 42-acre tract in the Southern Judicial District of Illinois to broadcast television and radio programs for CBS-owned station KMOX.

Paragraph 2 of the CBS Motion to Transfer asserted that "all witnesses to this cause reside in Chicago." But in a footnote (p. 5) to Exhibit I of said CBS Brief in Support of Motion for Change of Venue, CBS concedes that:

> ". . . the events occurring at the University of Mississippi must to some degree be proved by testimony of persons living outside the State of Illinois."

As CBS concedes, General Walker lives in Dallas. The occurrence witnesses as to whether General Walker said,

"Let's go kill them men" and tried to start an insurrection at Oxford, Mississippi, do not reside in Chicago. Most of them reside in Mississippi; and some, like General Walker, reside in Texas.

The non-timely affidavit which CBS filed 55 days after its motion merely stated that it would be a hardship for announcer Don Cannon to travel from Chicago to Springfield, Illinois. Since Cannon could not be found by the U. S. Marshal for service and CBS has never revealed his residence, he is not a party to this case; and his attendance at the trial is not necessary.

If CBS wants Cannon's testimony, it can easily take his deposition in Chicago or arrange for him to attend the trial in Springfield. The Donald J. Cannon Affidavit was the only affidavit filed by CBS in support of its Motion to Transfer prior to the trial court's denial thereof on June 11, 1969. CBS complains that "General Walker filed no counter-affidavits in opposition to the Motion to Transfer." No such counter-affidavits were required because the only affidavit filed by CBS related to the witness Cannon and to no one else.

CBS, as movant, was required to set out in affidavits the substance of the testimony its alleged inconvenienced witnesses will give. CBS did not do this. The courts refuse to transfer on the basis of conclusory affidavits. **General Portland Cement Co. v. J. Sam Perry** (1953, 7th Cir.), 204 F. 2d 316, 320; **Development Co. of America v. Insurance Co. of North America** (1966), 249 F. Supp. 117, 118.

Any defense of truth would appear to require witnesses who were present at Oxford, Mississippi, and heard Walker. Such witnesses are not apt to be residents of the Northern District of Illinois, and CBS has never named any such.

(d) **The Proceedings Below**

Contrary to the allegations in its petition, the CBS documents filed below did not demonstrate that the Southern District has no relationship to this cause. Instead Exhibit A to said CBS Brief in Support of Defendants' motion for Change of Venue (the Nielsen Market Coverage Area Chart) showed that WBBM covers 13 counties in the Southern Judicial District and is heard in all counties in this District.

Said CBS Brief (p. 4) was predicated on the false assumption that General Walker and his witnesses from Texas and Mississippi "must first fly to Chicago and either transfer planes or utilize another means of transportation to arrive at this forum." This of course is not true and these witnesses could travel by plane or by car to Springfield from the St. Louis Airport quicker and cheaper than by flying over Springfield to Chicago and then returning to Springfield. See Walker Affidavit in Opposition to Motion for Reconsideration, Appendix "A".

CBS's Response to Plaintiff's Request for Admission of Facts (filed herein on November 13, 1969), admits that the telephone dialogue, alleged to be defamatory of plaintiff, "is substantially correctly set forth in Paragraph 4 of Plaintiff's Complaint" and "said dialogue was broadcast by WBBM Radio." Therefore, the expense and hardship, which CBS referred to in its Motion to Transfer, of producing its broadcast records and broadcast witnesses would appear to be unnecessary because the broadcast language is admitted.

After the CBS Motion to Transfer was denied on June 11, 1969, CBS filed a Motion for Reconsideration on July 18 to which it attached the affidavits of Allan W. Kurman and Paul A. Fanning who had worked for CBS when the libel was broadcast on September 16, 1967. Their affi-

davits did not state anything concerning the truth of said CBS broadcast against General Walker and did not contain any facts to show that either affiant would be a material, competent or relevant witness at the trial. General Walker filed an affidavit (Appendix "A") in opposition to the Kurman and Fanning affidavits stating that "the witnesses who will testify for the Plaintiff in this case are from the states of Texas and Mississippi, and a trial of this cause in Springfield, Illinois, will be more convenient and less expensive for Plaintiff and for these witnesses than a trial in Chicago, Illinois." This affidavit also stated that the forum of Springfield, Illinois, was actually much closer and convenient to CBS than the forum of Dallas, Texas, which would also have been a proper venue site for the filing and trial of this case.

(c) **The Order of the Seventh Circuit**

CBS delayed trial of this case for almost a year (namely from October 22, 1968 to September 19, 1969) by requesting both oral argument and briefs on its Motion for Change of Venue and then again on its Motion for Reconsideration. This case has been at issue since February 17, 1969. On September 19, 1969 the following order was entered in open court without objection from counsel for CBS who was present:

> "Jury trial set for Monday, January 19, 1970 at 10:00 a. m. at Springfield."

CBS then filed a Petition for Writ of Mandamus with the Seventh Circuit. This Petition was fully briefed by both sides and was promptly denied on October 21, 1970. CBS waited 88 days and then filed this petition for certiorari only two days before its trial was scheduled to start.

REASONS FOR DENYING THE WRIT

This case does not involve any question of Federal law which has not already been well settled by this Court. In **American Flyers Airline Corporation v. Farrell** (1967), 385 F. 2d 936, 938, the Court of Appeals for the 2d Circuit said:

> ". . . this court has never in its entire history granted one of these writs to compel a transfer."

There the court denied a writ of mandamus to compel a transfer from New York to Oklahoma where the airplane crash in question occurred and Judge Medina said (p. 937):

> "There is the usual aggregation of arguments supporting the contention that considerations of fairness and justice, the convenience of witnesses, stipulations for paying the expenses of transporting witnesses, and the requirements of sound judicial administration so far outweigh the reasons given by Judge McGohey for refusing to order the transfer as to make his ruling a 'clear abuse of discretion.' That Judge McGohey did exercise his discretion is abundantly plain. His opinion below is reported at 42 F. R. D. 341. Moreover, it cannot be doubted that we lack power under the All Writs statute, 28 U. S. C., Section 1651, to consider the pros and cons and issue the writ even if we should conclude that Judge McGohey's order was wrong and that we would have directed the transfer had the original application been addressed to us. The reason, as quoted, from De Beers Consol. Mines, Ltd. v. United States, 325 U. S. 212, 217, 65 S. Ct. 1130, 89 L. Ed. 1566 (1945), by our brother Friendly in his concurring opinion in A. Olinick & Sons v. Dempster Bros., Inc.,

365 F. 2d 439, 446 (2 Cir. 1966) is that **the All Writs statute cannot 'be availed of to correct a mere error in the exercise of conceded judicial power,' but can be used only 'when a court has no judicial power to do what it purports to do**—when its action is not mere error but usurpation of power.'" (Emphasis added.)

As in the instant case, the defendants sought certiorari which was denied by the Supreme Court in 390 U. S. 1012, 20 L. Ed. 2d 162.

Moore's **Federal Practice** summarizes the law on transfer (Vol. 1, No. 0.147):

"If the order denies transfer it, too, is interlocutory.

"These orders because of their interlocutory character, are non-appealable as of right . . . (pp. 1962-1963).

* * * * * * * *

"The supplementary review power conferred on the courts by Congress in the All Writs Act is, however, meant to be used only in the exceptional case . . . (pp. 1966-1967).

* * * * * * * *

"All circuits have been extremely reluctant to find an abuse of discretion by the district court, and thus in the great bulk of cases involving district court discretion the prerogative writ has been dismissed or denied" (p. 1972).

Moore's **Federal Practice** gives these reasons for not reversing a trial court's ruling on transfer:

(1) "where the transfer would merely shift the inconvenience from one party to the other" (Vol. 1, p. 1778, n. 5);

(2) "where after balancing all the factors, the equities lean but slightly in favor of the movant" (Vol. 1, p. 1778, n. 5);

(3) "delay in getting to trial on the merits" and "docket congestion" (Vol. 1, p. 1782, notes 17 and 18);

(4) "The appellate courts should not countenance dilatory tactics by a party in seeking review of orders involving transfer" (Vol. 1, p. 1971);

(5) "Section 1404(a) vests a wide discretion in the district court which should not be exercised originally by this court" (Court of Appeals) (Vol. 1, p. 1780, n. 8);

(6) "The burden of establishing that there should be a transfer, however remains upon the moving party, who still must make a convincing showing" (Vol. 1, p. 1787).

The pertinent cases, such as **American Flyers Airline Corporation v. Farrell** (C. A. 2, 1969), 385 F. 2d 936, cert. denied 390 U. S. 1012, 20 L. Ed. 2d 162; **Bankers Life & Casualty Co. v. Holland** (1953), 346 U. S. 379, 383, 98 L. Ed. 106; **Ex Parte Fahey** (1947), 332 U. S. 258, 260, 91 L. Ed. 2041; **Casper Platt v. Minnesota Mining & Manufacturing Co.** (1964), 376 U. S. 240, 245, 11 L. Ed. 2d 674, 678; **Butterick Company v. Hubert L. Will** (1963), 316 F. 2d 111, 113; and the dicta in **Hubert L. Will v. United States** (1967), 389 U. S. 90, 95, 19 L. Ed. 2d 305, 310, and **Chicago, Rock Island and Pacific Railroad Co. v. Igoe** (1955), 220 F. 2d 299, 303, all show that this court should not mandamus the district court in this type case.

I. **The Respondent and Court of Appeals Followed the Transfer Terms of Section 1404(a).**

CBS has complained that "the district court did not follow the command of Section 1404(a)." There is no command in 1404(a). It reads:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C., § 1404(a).

Please note the non command words "**may** transfer." A Federal district judge has "discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a)." **James B. Parsons v. Chesapeake & Ohio Railway Co.** (1963), 375 U. S. 71, 74, 11 L. Ed. 137, 139.

The words "in the interest of justice" in Section 1404(a) include "delay in getting to trial on the merits." See 1 Moore's **Federal Practice**, p. 1782, n. 17 and cases there cited.

The instant case was set for jury trial on Monday, January 19, 1970, at Springfield, and is still ahead of nearly all pending cases on the trial docket. If transferred to Chicago, it would be delayed about a year in getting to trial since it would come behind the pending 1,944 civil and 493 criminal cases awaiting trial in the Northern District. See Report of the Director of the Administrative Office of the U. S. Courts for period ending September 30, 1969, Tables C 1 and D 1.

That a delay in getting to trial resulting from a transfer is not "in the interest of justice" is well-stated in **Metropolitan Life Insurance Co. v. Potter Bank & Trust Co.** (1955 Penn.), 135 F. Supp. 645, 646-647:

> "[4] Cases on our nonjury calendar are now being tried promptly. We have already set this case for trial. There is no reason why the deposition of any unwilling witness who could not be subpoenaed to appear in Pittsburgh could not be taken and used as evidence in this case. To transfer the case to another district would not be in the interest of justice. The interest of justice would best be served by bringing

cases to trial and not by delaying trial. Accordingly, the motion for transfer is denied and appropriate order setting this case for the week beginning November 28, 1955, will be entered."

We were unable to find a single case where a transfer to an **adjoining** district (which Petitioner is requesting) was granted "for the convenience of parties and witnesses." Where such convenience was considered a factor, the transfer was always to a district which was not adjacent or close. In **Swanson v. Badger Mutual Insurance Co.** (1967), 275 F. Supp. 544, the court denied a request, based on inconvenience to defendants, to transfer the case from the Northern District of Illinois to the adjoining Southern District of Wisconsin, holding (p. 548) "the inconvenience to the defendants is not of sufficient weight to call for a change of venue."

The expense of Defendant's witnesses in traveling from Chicago to Springfield is matched by the expense of Plaintiff's witnesses in traveling from Springfield to Chicago. The hotel room and food rates in Chicago are probably somewhat higher than in Springfield. On balance, there would not appear to be any significant difference between the adjoining Northern and Southern Districts of Illinois concerning the convenience of the parties and witnesses.

The order entered by Respondent Court in denying the Motion for Transfer on June 11 stated that it considered the "court trial docket calendars, number and locality of witnesses, among other matters, . . ." and gave "due consideration of all points raised in this matter by both parties." It is respectfully submitted that the statutory criteria were considered, and the Court exercised its discretionary power in accordance with applicable law. Even if, as alleged by Petitioner, the District Court used an inappropriate factor or criteria, this would not suffice

to empower a transfer. In **Casper Platt v. Minnesota Mining & Manufacturing Company** (1964), 376 U. S. 240, 245, 11 L. Ed. 2d 674, 678, this Court said:

> "The District Court's use of an inappropriate factor did not empower the Court of Appeals to order the transfer. . . . Extraordinary writs are 'reserved for really extraordinary causes,' Ex parte Fahey, 332 U. S. 258, 260, 91 L. Ed. 2041, 2043, 67 S. Ct. 1558 (1947), and then only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U. S. 21, 26, 87 L. Ed. 1185, 1190, 63 S. Ct. 938 (1943). Here, however, the Court of Appeals undertook a de novo examination of the record and itself exercised the discretionary function which the rule commits to the trial judge. This the court should not have done since **the writ cannot be used 'to actually control the decision of the trial court.'** Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 383, 98 L. Ed. 106, 111, 74 S. Ct. 145 (1953)." (Emphasis added.)

Trial in the Southern District of Illinois would necessitate a "smaller amount of expenses required for willing witnesses" of the Plaintiff and a little more for the willing witnesses of the Defendant. As stated in **Toti v. Plymouth Bus Company** (1968), 281 F. Supp. 897, 898:

> "Moreover, a showing of inconvenience to the defendant is not enough to justify § 1404(a) relief, where transfer would merely place the inconvenience on the plaintiff. Miracle Stretch Underwear Corp. v. Alba Hosiery Mills, 136 F. Supp. 598, 511 (D. Del. 1956)."

See also **Scaramuzzo v. American Flyers Airline Corporation** (1966), 260 F. Supp. 746, 748.

II. No Basis for Extraordinary Writ of Mandamus.

The latest Supreme Court language on the issuance of mandamus is found in **Hubert R. Will v. United States** (1967), 389 U. S. 90, 95, 19 L. Ed. 2d 305, 310:

> "The peremptory writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' Roche v. Evaporated Milk Assn., 319 U. S. 21, 26, 87 L. ed. 1185, 1190, 63 S. Ct. 938 (1943). While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power, will justify the invocation of this extraordinary remedy. De Beers Consol. Mines, Ltd. v. United States, 325 U. S. 212, 217, 89 L. ed. 1566, 1572, 65 S. Ct. 1130 (1945)."

There is nothing in the instant case justifying invocation of the extraordinary remedy of mandamus. Trial in Springfield, Illinois, is no less convenient for all the parties and witnesses than is Chicago. CBS complains that it cannot have compulsory process to compel unwilling witnesses to come to Springfield. Likewise Plaintiff cannot compel unwilling witnesses to come to Chicago. Both parties have the remedy of compulsory process to compel the attendance of witnesses by subpoena for depositions as provided in Federal Rules 26(a) and 45(d).

Petitioner states that its radio station, WBBM, and its employees and pertinent files and records are in Chicago. These are all under the control of Petitioner. No reason has been presented why said employees, files and records, if pertinent, could not easily be brought to Springfield for the trial.

Petitioner complains that one of the many factors considered by the Court is the Plaintiff's choice of forum, "if the forum is one provided for by law." This is a valid factor for consideration. See **Time, Inc. v. Manning** (1966), 366 F. 2d 690, 698, 1 Barron & Holtzoff, **Federal Practice & Procedure** (Wright Ed., § 86.3), 1 Moore's Federal Practice, p. 1778. In **Rodriguez v. Pan American Life Insurance Co.** (1962), 311 F. 2d 429, 434, the Court said: "Plaintiff's privilege to choose, or not to be ousted from, his chosen forum is highly esteemed."

III. **Trial of This Case in the Southern District Will Not Chill First Amendment Rights But Removal May Chill Equal Justice Under Law Concepts.**

Counsel for CBS contends that requiring it to go to trial in a jurisdiction in which it is doing business and operates a large broadcasting facility, and which adjoins the district where it has its registered office and owns a large television and radio station will somehow have a "chilling effect upon First Amendment rights." No facts are cited in support of this strange conclusion. If the courts or the inhabitants of the Southern District were in any way prejudiced against CBS, then such might be the subject of a proper motion for transfer, but no such showing has been made or even alleged.

Respondent submits that the exercise of his admitted discretion does not convert this case into an "extraordinary cause" justifying the extraordinary writ of mandamus. Otherwise, every defendant in a case involving out-of-the-district witnesses would have an easy way to delay the trial for years by first asking transfer, then asking reconsideration, then petitioning for writ of mandamus, then a rehearing, and then petitioning for certiorari to the Supreme Court. If such a dilatory procedure is approved, it will make recourse to the Federal Courts too expensive for any but the largest corporations.

Counsel for Respondent assert that CBS is a corporation organized for profit which is entitled to fair treatment but not to any special or preferential treatment. Counsel invite the court's attention to the following language used by this Court to describe a similar large news-gathering organization in a case involving a somewhat similar plea of First Amendment privilege:

> ". . . we are not unmindful of the argument that newspaper publishers charged with combining cooperatively to violate the Sherman Act are entitled to have a different and more favorable kind of trial procedure than all other persons covered by the Act. . . . For equal—not unequal—justice under law is the goal of our society. Our legal system has not established different measures of proof for the trial of cases in which equally intelligent and responsible defendants are charged with violating the same statutes. Member publishers of AP are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want. . . . The fact that the publisher handles news while others handle food does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices."
>
> **Associated Press v. United States** (1944), 326 U. S. 1, 6-7, 89 L. Ed. 2013, 2023.

CONCLUSION

The Respondent complied with 28 U. S. C., § 1404(a). His exercise of discretion is not subject to review absent an extraordinary cause which this is not. He respectfully

requests this Court to deny the Petition for Writ of Mandamus or certiorari.

Respectfully submitted

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Alton, Illinois 62002
Attorneys for Respondent

APPENDIX "A"

In the United States District Court
for the Southern District of Illinois
Southern Division

Edwin A. Walker,
Plaintiff,
v.
Columbia Broadcasting System Inc., and Donald J. Cannon,
Defendants.
} Civil No. 4281

Affidavit in Opposition to Motion for Reconsideration

(Filed September 18, 1969)

State of Texas
County of Dallas } ss.

Edwin A. Walker, being duly sworn, deposes and says:

1. I am Plaintiff in this cause and have personal knowledge of the matters herein referred to and make this Affidavit in opposition to the Defendants' Motion for Reconsideration.

2. Plaintiff resides in Dallas, Texas, and the witnesses who will testify for the Plaintiff in this case are from the states of Texas and Mississippi, and a trial of this cause in Springfield, Illinois, will be more convenient and less expensive for Plaintiff and for these witnesses than trial in Chicago, Illinois.

3. Neither the testimony of the Defendant Columbia Broadcasting System, Inc.'s employees, Allen W. Kurman and Paul A. Fanning, who signed the affidavits at-

tached to Defendants' Motion for Reconsideration, nor the testimony of the other four technicians named in the Kurman affidavit as having worked on the Don Cannon Show at the time of the broadcast in question, is necessary at the trial because said Defendant is required by the Federal Communications Commission to retain and to furnish to Plaintiff the transcript of the program broadcast by the Defendants on the evening of September 16, 1967, which is the subject of Plaintiff's Complaint, and which Plaintiff requested from Station WBBM on October 11, 1967.

4. If Plaintiff had filed suit against the Defendants in Texas, said alleged witnesses would be required to travel not the short distance to Springfield, Illinois, which is less than three hours by automobile and less than one hour by plane, but the lengthy distance to Dallas, Texas. Traveling the comparatively short distance from Chicago to Springfield on Interstate Highway 55 or by the available commercial jet aircraft is not a hardship and could be so co-ordinated with Plaintiff's counsel that the witnesses named by Defendant, whose testimony Plaintiff does not consider necessary or relevant, would not be required to be away from their jobs more than one day.

/s/ Edwin A. Walker
Edwin A. Walker

Subscribed and sworn to before the undersigned Notary Public this 15th day of September, 1969.

/s/ Harry M. Alexander
Notary Public

My Commission Expires: June 1, 1971.